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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 STANLEY McQUERY,  
12 Plaintiff,  
13 v.  
14 CITY OF SAN DIEGO, et al.,  
15 Defendants.  
16

Case No.: 16cv170 BAS (BGS)

**REPORT AND  
RECOMMENDATION ON MOTION  
FOR SUMMARY JUDGMENT AND  
MOTION TO DISMISS FOR LACK  
OF PROSECUTION**

[ECF Nos. 18, 23]

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18 Plaintiff Stanley McQuery (“Plaintiff”) filed a Complaint pursuant to 42 U.S.C. §  
19 1983 on January 22, 2016. (ECF No. 1.) Plaintiff’s Complaint appears to assert claims  
20 for excessive force, assault and battery, denial of medical care, and cruel and unusual  
21 punishment based on allegations a San Diego police officer ordered a police dog to bite  
22 and hold him while arresting him. (*Id.*)

23 On January 9, 2017, Defendants City of San Diego *erroneously named as San*  
24 *Diego Police* and Jonathan Wiese, *erroneously named as J. Wiese* (“Officer Wiese”) filed  
25 a Motion for Summary Judgment. (Mot. for Summ. J. (“Motion”) [ECF No. 18].)  
26 Plaintiff did not file an Opposition to the Motion. On April 25, 2017, Defendants filed a  
27 Motion to Dismiss for Lack of Prosecution. (ECF No. 23.) Both motions have been  
28 referred to the undersigned Magistrate Judge for a Report and Recommendation

1 (“R&R”). For the reasons set forth below, the Court **RECOMMENDS** that Defendants’  
2 Motion for Summary Judgment be **GRANTED** and Defendants’ Motion to Dismiss for  
3 Lack of Prosecution be **DENIED as moot**.

## 4 **BACKGROUND**

### 5 **I. Procedural Background**

6 Plaintiff filed his Complaint in this action on January 22, 2016. (ECF No. 1.)  
7 Plaintiff’s Motion to Proceed In Forma Pauperis was granted on March 2, 2016 and a  
8 summons was issued. (ECF Nos 3-4.) After the Court received notice that Plaintiff had  
9 been transferred to California Institution for Men, the Court reissued the IFP Package to  
10 Plaintiff at his new address. (ECF Nos. 6-7.) On May 6, 2016, the City of San Diego and  
11 Jonathan Wiese filed an Answer to the Complaint. (ECF No. 9.)

12 On May 10, 2016, the Court issued a Scheduling Order setting deadlines for the  
13 completion of discovery and all pretrial deadlines. (ECF No. 10.) On July 20, 2016,  
14 Plaintiff submitted a letter that the Court construed as a request for appointment of  
15 counsel. (ECF No. 12) That request was denied without prejudice. (ECF No. 13.)

16 On September 23, 2016, Plaintiff filed a Notice of Change of Address. (ECF No.  
17 14.) On September 27, 2016, Plaintiff submitted a form that appeared to be a state court  
18 of appeals form to request an extension. (ECF No. 15-16.) As the Court explained in  
19 denying the request, the only date identified on the form was not a deadline set by this  
20 Court. (ECF No. 17.) However, the Court’s Order advised Plaintiff that if he was  
21 seeking to extend a deadline set by the Court, he could file a motion identifying the  
22 deadline, what he was required to do by the deadline, and explain why he needed the  
23 extension of the deadline. (*Id.*)

24 The record before the Court reflects that Plaintiff has neither propounded nor  
25 responded to any discovery or otherwise complied with the Scheduling Order.  
26 Specifically, Defendants’ Motion indicates that Plaintiff failed to provide his initial  
27 disclosures and did not propound discovery. (Mot. Ex. A, Decl. of David C. Scott (“Scott  
28 Decl.”) ¶¶ 4-6.) Plaintiff also did not respond to Defendants’ discovery requests. (*Id.* at

¶¶ 7-8.) Nor did Plaintiff serve his pretrial disclosures or submit a pretrial order to Defendants. (Mot. to Dismiss for Lack of Prosecution [ECF 23] at 2.)

As noted above, on January 9, 2017, Defendants City of San Diego and Jonathan Wiese filed a Motion for Summary Judgment. (ECF No. 18.) In addition to notice of the Motion by way of Defendants' service of the Motion, the Court also provided Plaintiff with notice of the Motion and requirements for opposing summary judgment pursuant to *Klingele v. Eikenberry*, 849 F.2d 409 (9th Cir. 1988) and *Rand v. Rowland*, 154 F.3d 952 (9th Cir. 1998) (en banc). (ECF No. 19.) This notice also indicated that his Opposition was due March 9, 2017. (*Id.*) Additionally, the Court issued a separate briefing schedule. (ECF No. 20.) The briefing schedule also advised Plaintiff his Opposition or Statement of Non-Opposition was due on March 9, 2017. (*Id.*) Plaintiff has not filed an Opposition to the Motion.

## **II. Factual Background**

Defendants have produced evidence of the following facts.<sup>1</sup> On April 23, 2015, at approximately 3:30 a.m., Officer Wiese assisted in responding to a report of a "hot prowl burglary"<sup>2</sup> in which an individual had broken into a residence, forced the victim inside the residence out of his electric wheelchair, and fled the location with the victim's wheelchair and cell phone. (Motion, Ex. B, Decl. of Jonathan Wiese ("Wiese Decl.") ¶¶ 4, 7; Ex. C, Decl. of Michael Wagner ("Wagner Decl.") ¶ 7.) The suspect was described by the dispatcher as a black male in his thirties, medium build, shirtless, wearing dark pants, and with a bandage on his forehead. (Wiese Decl. ¶ 7.)

As he approached the area, Officer Wiese observed a shirtless black male in dark pants riding in an electric wheelchair. (*Id.* ¶ 9.) When the suspect, later identified as Plaintiff, saw the police car in front of Officer Wiese's vehicle arriving, he jumped out of

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<sup>1</sup> As the Court explains more below, these facts are undisputed because Plaintiff has not filed an opposition or put forth any evidence disputing them.

<sup>2</sup> Officer Wiese's Declaration indicates that a hot prowl burglary is a burglary in which the residence or building being burglarized is occupied. (Wiese Decl. ¶ 6.)

1 the wheelchair and ran. (*Id.* ¶ 10.) Plaintiff cut through a gas station and down an  
2 alleyway into a residential area. (*Id.* ¶ 11) Officer Wiese, while still driving his vehicle,  
3 rolled down his window and observed Plaintiff had a white bandage on his forehead.  
4 (*Id.*) Officer Wiese yelled something along the lines of “Stop or I’ll send the dog! Stop  
5 or I’ll send the police dog and he will bite you!”<sup>3</sup> (*Id.* ¶ 14.) Plaintiff continued to run.  
6 (*Id.*)

7 Officer Wiese released the dog, Ufo, from the patrol car and gave him the  
8 command to bite and hold. (*Id.* ¶ 15.) Officer Wiese and Ufo followed Plaintiff down an  
9 ally until Plaintiff turned into an apartment complex. (*Id.* ¶ 17.) Officer Wiese recalled  
10 Ufo because the dog lost sight of Plaintiff and then Officer Wiese redirected him in the  
11 direction Plaintiff went. (*Id.* ¶¶ 18-19.) Plaintiff then made a sharp turn onto the  
12 sidewalk in front of the apartment complex and dove into knee high bushes such that  
13 Officer Wiese could not see what he was doing. (*Id.* ¶¶ 20-21.)

14 Ufo followed Plaintiff into the bushes. (*Id.* ¶ 22.) Plaintiff sat up and Officer  
15 Wiese could see that Ufo had bitten and was holding Plaintiff by his upper right arm, but  
16 he could not see Plaintiff’s hands or the lower half of his body. (*Id.* ¶¶ 23-24.) When  
17 Officer Wiese ordered Plaintiff onto his stomach, Plaintiff moved around for a bit and  
18 then laid on his stomach with Ufo continuing to hold his right arm. (*Id.* ¶¶ 24-25.)

19 Officer Wiese then approached Plaintiff, told him to put his left arm behind his  
20 back while signaling other officers to his location with his flashlight, and then held on to  
21 Plaintiff’s left arm behind his back. (*Id.* ¶¶ 26-27.) When Officer Whann arrived at the  
22 location, Officer Wiese handed him Plaintiff’s left arm while Officer Wiese reached  
23 under Plaintiff and pulled out his right arm, and then handed his right arm to Officer  
24 Whann to handcuff Plaintiff. (*Id.* ¶ 28.) While Officer Whann handcuffed Plaintiff,  
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28 <sup>3</sup> He indicates he yelled the quoted language, but notes it is not verbatim. (Wiese Decl. ¶ 14.)

1 Officer Wiese took hold of Ufo, removed him from the bite, walked him out of the  
2 bushes, and returned him to the patrol car. (*Id.* ¶¶ 29-30.)

3 Plaintiff was patted down and placed in a patrol car by Officers Sims and  
4 MacIntyre while Officer Kashouty radioed for medics to provide medical assistance to  
5 Plaintiff. (Motion, Ex. D, Decl. of Brian Kashouty (“Kashouty Decl.”) ¶¶ 5-6.) When  
6 paramedics arrived, Plaintiff was placed on a gurney by paramedics and treated for  
7 injuries. (*Id.* ¶ 7.) Before Plaintiff was transported by paramedics to a hospital, Plaintiff  
8 was identified by the victim as the person that broke into his residence and took his  
9 cellphone and wheelchair. (Wagner Decl. ¶ 11.)

10 Officer Wiese observed that Plaintiff was extremely agitated, sweating profusely,  
11 heard Plaintiff claim to have ingested an unknown substance and demand to have his  
12 stomach pumped, and that he was uncooperative with the medics. (Wiese Decl. ¶ 32.)  
13 Officers Wiese and Wagner both indicate Plaintiff was transported to Alvarado Hospital  
14 where he was treated for dog bite injuries. (*Id.* ¶ 34; Wagner Decl. ¶ 12.) Plaintiff was  
15 then transported to Central Headquarters for processing and then on to county jail by 8:15  
16 a.m. that morning. (Wagner Decl. ¶¶ 13-14; Kashouty Decl. ¶¶ 12-13.)

## 17 DISCUSSION

### 18 I. Summary Judgment

#### 19 A. Applicable Standard

20 Summary judgment is appropriate when “there is no genuine dispute as to any  
21 material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.  
22 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

23 A moving party bears the initial burden of showing there are no genuine issues of  
24 material fact. *Horphag Research Ltd. v. Garcia*, 475 F.3d 1029, 1035 (9th Cir. 2007)  
25 (citing *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir.  
26 1987)). The moving party can do so by negating an essential element of the non-moving  
27 party’s case, or by showing that the non-moving party failed to make a showing sufficient  
28 to establish an element essential to that party’s case, and on which the party will bear the

1 burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986). As  
2 explained more fully below, Defendants have met their initial burden of showing there  
3 are no genuine issues of material fact and they are entitled to judgment as a matter of law.

4 The burden then shifts to the non-moving party to show that there is a genuine  
5 issue for trial. *Horphag Research Ltd.*, 475 F.3d at 1035. However, to avoid summary  
6 judgment, the nonmovant cannot rest solely on conclusory allegations. *Berg v.*  
7 *Kincheloe*, 794 F.2d 457, 459 (9th Cir. 1986). Rather, he must present “specific facts  
8 showing there is a genuine issue for trial.” *Anderson*, 477 U.S. at 256 . “[F]acts must be  
9 viewed in the light most favorable to the nonmoving party only if there is a ‘genuine’  
10 dispute as to those facts.” *Scott v. Harris*, 550 U.S. 372, 380 (2007) (citing Fed. R. Civ.  
11 P. 56(c)). Plaintiff, who has nothing before the Court except conclusory allegations in his  
12 Complaint, has not shown there is a genuine issue for trial.

### 13 **B. Lack of Opposition**

14 Plaintiff has not filed any opposition to the Motion. However, under Federal Rule  
15 of Civil Procedure 56(e), summary judgment may not be granted “by default even if there  
16 is a complete failure to respond to the motion.” *Heinemann v. Satterberg*, 731 F.3d 914,  
17 917 (9th Cir. 2013) (quoting Fed. R. Civ. P. 56(e) Adv. Comm. Notes (2010)). Where, as  
18 here, a party fails to “address another party’s assertion of fact as required by Rule 56(c),”  
19 the court has four options. Fed. R. Civ. P. 56(e). The Court may “(1) give an opportunity  
20 to properly support or address the fact; (2) consider the fact undisputed for purposes of  
21 the motion; (3) grant summary judgment if the motion and supporting materials—  
22 including the facts considered undisputed—show that the movant is entitled to it; or (4)  
23 issue any other appropriate order.” *Id.*

24 As outlined above, Plaintiff has not filed an Opposition to the Motion despite being  
25 provided notice of the Motion by Defendants and the Court, as well as notice of his  
26 obligation to respond to it. Plaintiff’s failure to respond to the Motion also follows his  
27 failure to comply with initial and pretrial disclosure requirements or to respond to  
28 Defendants’ discovery requests. Plaintiff has essentially filed a Complaint and

1 abandoned his case except for updating his address. Finally, as explained in more detail  
2 below, Defendants have put forth evidence in support of their Motion showing that  
3 Defendants are entitled to summary judgment.

4 Based on the foregoing, pursuant to Rule 56(e), the Court **RECOMMENDS** the  
5 facts set forth by Defendants be considered undisputed and the Motion for Summary  
6 Judgment be **GRANTED** because, as discussed below, the Motion and supporting  
7 materials show that Defendants are entitled to summary judgment.

### 8 **C. Plaintiff's Claims**

9 It appears from the allegations of Plaintiff's Complaint that he is asserting claims  
10 for excessive force, assault and battery,<sup>4</sup> denial of medical care, and cruel and unusual  
11 punishment. The Court addresses each below.

#### 12 **1. Excessive Force**

##### 13 **a) Fourth Amendment Violation**

14 Plaintiff's Complaint alleges that Officer Wiese's use of the police dog to bite and  
15 hold Plaintiff was excessive force.<sup>5</sup> Plaintiff appears to assert this claim under the 1st,  
16 4th, 8th, and 14th Amendments. "In addressing an excessive force claim brought under §  
17 1983, [the] analysis begins by identifying the specific constitutional right allegedly  
18 infringed by the challenged application of force." *Graham v. Connor*, 490 U.S. 386, 394  
19 (1989). "The validity of the claim must then be judged by reference to the specific  
20 constitutional standard which governs that right, rather than to some generalized  
21 'excessive force' standard." *Id.* (citing *Tennessee v. Garner*, 471 U.S. 1, 7-22 (1985)).  
22 "[A]ll claims that law enforcement officers have used excessive force . . . in the course of  
23 \_\_\_\_\_

24 <sup>4</sup> It appears Plaintiff has identified assault and battery within his claim of excessive force,  
25 however, out of an abundance of caution, the Court also analyzes it separately below.

26 <sup>5</sup> Plaintiff's Complaint, under a heading for cruel and unusual punishment, alleges that his  
27 handcuffs were too tight and this caused him pain. To the extent Plaintiff is asserting an  
28 excessive force claim, or any other claim, on this basis, there is no evidence to support it.  
There is no evidence that Plaintiff's handcuffs were too tight or that he suffered any  
injury as a result.

1 an arrest, investigatory stop, or other ‘seizure’ of a free citizen should be analyzed under  
2 the Fourth Amendment and its ‘reasonableness’ standard, rather than under a ‘substantive  
3 due process’ approach.” *Id.* at 395. Because Plaintiff’s claim is based on conduct during  
4 the course of his arrest, the Court analyzes it under the Fourth Amendment.

5 “Determining whether the force used to effect a particular seizure is reasonable  
6 under the Fourth Amendment requires a careful balancing of the nature and quality of the  
7 intrusion on the individual’s Fourth Amendment interests against the countervailing  
8 governmental interests at stake.” *Marquez v. City of Phoenix*, 693 F.3d 1167, 1174 (9th  
9 Cir. 2012) (quoting *Graham*, 490 U.S. at 396).

### 10 (1) Nature and Quality of the Intrusion

11 In considering the nature and quality of the intrusion on Plaintiff’s Fourth  
12 Amendment rights, the evidence indicates that Plaintiff was bitten by the dog and the dog  
13 held on to him until another officer arrived to assist in handcuffing Plaintiff. He suffered  
14 injuries significant enough that he was taken to a hospital for treatment, but was released  
15 from the hospital within a few hours. However, for purposes of this analysis the Court  
16 assumes that the force used by deploying the dog was very serious given the potential for  
17 severe injury posed by a dog bite. *See Miller v. Clark Cnty.*, 340 F.3d 959, 964 (9th Cir.  
18 2003) (concluding that dog bite and hold was a serious intrusion on Plaintiff’s Fourth  
19 Amendment interests); *see also Chew v. Gates*, 27 F.3d 1432, 1441 (9th Cir. 1994)  
20 (assessing force used in having a dog seize a suspect was severe).

### 21 (2) Governmental Interests at Stake

22 Reasonableness is analyzed “from the perspective ‘of a reasonable officer on the  
23 scene, rather than with the 20/20 vision of hindsight.’” *Plumhoff v. Rickard*, 134 S. Ct.  
24 2012, 2020 (2014) (quoting *Graham*, 490 U.S. at 396). Additionally, “the calculus of  
25 reasonableness must embody allowance for the fact that police officers are often forced to  
26 make split-second judgments—in circumstances that are tense, uncertain, and rapidly  
27 evolving—about the amount of force that is necessary in a particular situation.” *Graham*,  
28 490 U.S. at 396.

1        “[T]he test of reasonableness under the Fourth Amendment is not capable of  
2 precise definition or mechanical application,’ however, its proper application requires  
3 careful attention to the facts and circumstances of each particular case, including the  
4 severity of the crime at issue, whether the suspect poses an immediate threat to the safety  
5 of the officers or others, and whether he is actively resisting arrest or attempting to evade  
6 arrest by flight.” *Graham*, 490 U.S. at 396 (quoting *Bell v. Wolfish*, 441 U.S. 520, 559  
7 (1979) and citing *Garner*, 471 U.S. at 8-9). However, “these factors . . . are not  
8 exclusive. Rather, we examine the totality of the circumstances and consider whatever  
9 specific factors may be appropriate in a particular case, whether or not listed in *Graham*.”  
10 *Mattos v. Agarano*, 661 F.3d 433, 441 (9th Cir. 2011) (quoting *Bryan v. MacPherson*,  
11 630 F.3d 805, 826 (9th Cir. 2010)). Other relevant factors include whether less intrusive  
12 alternatives were available and whether warnings were given prior to the use of the force.  
13 *Glenn v. Washington Cnty.*, 673 F.3d 864 (9th Cir. 2011).

14                                    **(a) Severity of the Crime at Issue**

15        Plaintiff committed a “hot prowl” burglary of a residence. Officer Wiese knew  
16 this to be a burglary *with an occupant inside*. Additionally, on the way to the scene of the  
17 burglary, Officer Wiese heard the dispatcher report that Plaintiff broke into an occupied  
18 residence, forced the occupant out of his wheelchair, and fled the residence with the  
19 wheelchair and the victim’s phone. The severity of the crime at issue supports Officer  
20 Wiese’s use of force.

21                                    **(b) Immediate Threat to the Safety of the Officers or Others**

22        Officer Wiese, based on his training and 18 years of experience, was also aware  
23 that individuals committing home invasions of occupied residences are often armed and  
24 under this influence of narcotics. (Wiese Decl. ¶¶ 2, 5.) Additionally, although Officer  
25 Wiese does not indicate he observed a weapon, there were numerous times throughout  
26 Plaintiff’s flight from police that Plaintiff was out of sight and might have obtained  
27 something to be used as a weapon, including right before he was apprehended when he  
28 dove into bushes and Officer Wiese could not see what he was doing. Additionally,

1 Plaintiff's route, as he fled police, took him into a residential area and through an  
2 apartment complex, increasing the threat he posed to the public. Finally, Plaintiff was  
3 not just running from police for some minor infraction,<sup>6</sup> he was being sought for having  
4 broken into an inhabited residence, forcing the occupant out of his electric wheelchair,  
5 and taking the victim's wheelchair and phone. Plaintiff's conduct demonstrated a  
6 willingness to use physical force and indicated he posed a threat to the public and the  
7 officers. This factor weighs in favor of the use of force.

8 **(c) Resisting Arrest or Attempting to Evade Arrest**

9 Plaintiff was certainly attempting to evade arrest. He jumped out of the stolen  
10 electric wheelchair and started running when he saw police. He cut through a gas station  
11 and down a dark alley into a residential area. Officer Wiese, only a few feet away and  
12 yelling, told him to stop and he did not. He continued to attempt to evade arrest. He  
13 proceeded through an apartment complex and then attempted to conceal himself in  
14 bushes. Plaintiff's attempts to evade arrest weigh in favor of the use of force.

15 **(d) Less Intrusive Alternatives**

16 The Court could speculate that there might have been less intrusive alternatives to  
17 the force employed, however, it would be speculation. Officer Wiese was making a split  
18 second decision as to how to stop a suspect that was hiding in a residential area and was  
19 hiding in a way that Officer Wiese could not determine if Plaintiff was arming himself.  
20 He was attempting to take Plaintiff into custody on his own while at the same time using  
21 his flashlight to alert other officers to his location. Speculating that he might have been  
22 able to take Plaintiff into custody without the assistance of the dog would be the kind of  
23 20/20 hindsight the Court should not employ and "[w]hile the existence of less forceful  
24 options to achieve the governmental purpose is relevant, 'police officers . . . are not  
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26 <sup>6</sup> Unlike *Chew v. Gates*, where the plaintiff had been stopped for a traffic violation and  
27 eventually fled to a scrap yard after producing his driver's license and engaging in  
28 conversation with officers, here Plaintiff had committed a serious crime involving  
threatening behavior. 27 F.3d at 1442.

1 required to use the least intrusive degree of force possible.’’ *Marquez*, 693 F.3d at 1174  
2 (quoting *Forrester v. City of San Diego*, 25 F.3d 804, 07-08 (9th Cir. 1994)). Given the  
3 circumstances and the lack of evidence of any available less intrusive alternatives, this  
4 factor weighs in favor of the use of force.

#### 5 (e) Warnings Given

6 Officer Wiese warned Plaintiff of the exact use of force he was going to employ  
7 and did employ. He yelled at Plaintiff when Plaintiff was only a few feet away to stop  
8 and warned him that if he did not he would send the dog and the dog would bite him.  
9 Officer Wiese deployed the dog when Plaintiff refused to stop and continued to evade  
10 arrest. This factor weighs in favor of the use of force. *See Marquez*, 693 F.3d at 1175  
11 (“[I]f the officer warned the offender that he would employ force, but the suspect refused  
12 to comply, the government has an increased interest in the use of force.”).

13 Balancing the very serious nature of the intrusion on Plaintiff’s Fourth Amendment  
14 interests posed by the dog bite and hold against the governmental interests at stake under  
15 the *Graham* factors and totality of the circumstances discussed above, the Court finds the  
16 use of force was reasonable.

#### 17 b) Qualified Immunity

18 “Qualified immunity shields government officials from civil damages liability  
19 unless the official violated a statutory or constitutional right that was clearly established  
20 at the time of the challenged conduct.” *Reichle v. Howards*, 566 U.S. 658, 132 S. Ct.  
21 2088, 2093 (2012) (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011)). Under  
22 *Pearson v. Callahan*, the Court may decide which of the two prongs to address first. 555  
23 U.S. 223, 236 (2009). Here, as discussed above, there is no constitutional violation.  
24 Accordingly, Officer Wiese is entitled to qualified immunity.

25 Based on the lack of any evidence of a Fourth Amendment violation and Officer  
26 Wiese’s entitlement to qualified immunity on this claim, the Court **RECOMMENDS**  
27 that summary judgment be **GRANTED** on this claim.  
28

1                   **2.     Assault and Battery**

2           Plaintiff appears to have claimed he was subjected to assault and battery as part of  
3 his excessive force claim that the Court has already addressed. However, Defendants  
4 have produced evidence that any state law claim for assault and battery against the City  
5 or Officer Wiese is time barred for failing to present the claim to the City within six  
6 months after the accrual of the cause of action. Cal. Gov't Code § 911.2(a) (requiring  
7 presentment of claim for personal injury “not later than six months after the accrual of the  
8 cause of action.”). The incident happened on April 23, 2015 and Plaintiff’s claim was not  
9 presented until January 26, 2016. (Decl. of David Dunkle ¶ 3.) Plaintiff also failed to  
10 present an application to present a late claim. (*Id.* ¶ 4.) To the extent Plaintiff is  
11 asserting a separate claim for assault and battery, it is time-barred. The Court  
12 **RECOMMENDS** that summary judgment be **GRANTED** for Defendants on this claim.

13                   **3.     Denial of Medical Care**

14           Plaintiff’s Complaint identifies the First, Fourth, Eighth, and Fourteenth  
15 Amendments in conjunction with his allegation that he was “denied medical care at the  
16 place of his injuries.” (Compl. at 4.)

17           Defendants argue the claim is subject to the Due Process clause because Plaintiff  
18 was a pretrial detainee. Claims of denial of medical treatment by pretrial detainees arise  
19 under the Due Process Clause of the Fourteenth Amendment. *Carnell v Grimm*, 74 F.3d  
20 977, 979 (9th Cir. 1996); *Frost v. Agnos*, 152 F.3d 1124, 1129 (9th Cir. 1998) (“Claims  
21 by pretrial detainees are analyzed under the Due Process Clause of the Fourteenth  
22 Amendment, rather than the Eighth Amendment.”). “Because pretrial detainees’ rights  
23 under the Fourteenth Amendment are comparable to prisoners’ rights under the Eighth  
24 Amendment, however, we apply the same standards.” *Frost*, 152 F.3d at 1129 (citing  
25 *Redman v. Cnty. of San Diego*, 942 F.2d 1435, 1441 (9th Cir. 1991)). “Prison officials  
26 violate the Eighth Amendment if they are ‘deliberately indifferent to a prisoner’s serious  
27 medical needs.’” *Peralta v. Dillard*, 744 F.3d 1076, 1081 (9th Cir. 2014) (quoting *Estelle*  
28 *v. Gamble*, 429 U.S. 97, 104 (1976)).

1           However, *Tatum v. City and County of San Francisco*, the Ninth Circuit analyzed a  
2 claim by an arrestee based on the denial of medical care as an excessive force claim  
3 subject to the Fourth Amendment. 441 F.3d 1090, 1098-99 (9th Cir. 2006). The court  
4 found that a police officer who promptly summons the necessary medical assistance has  
5 acted reasonably for purposes of the Fourth Amendment.” *Id.* at 1099 (addressing  
6 officers not performing CPR on an arrestee).<sup>7</sup>

7           The distinction between the two may be whether the alleged need for medical care  
8 arises at the scene of arrest and because of the arrest or while in pretrial detention;  
9 however, Defendants are entitled to summary judgment under either standard. Officers at  
10 the scene promptly sought paramedics for Plaintiff. He was seen by paramedics at the  
11 scene and transported to a hospital where he was treated for his injuries. There is no  
12 evidence of deliberate indifference or that medical assistance was not promptly sought.  
13 The Court **RECOMMENDS** that summary judgment be **GRANTED** for Defendants on  
14 this claim.

#### 15                   4.     Cruel and Unusual Punishment

16           Defendants argue the Eighth Amendment’s prohibition on cruel and unusual  
17 punishment does not apply to Plaintiff because he had not been convicted and sentenced.  
18 However, the Court need not determine if this or any other standard might apply to such a  
19 claim prior to conviction because there is no evidence in support of this claim. Plaintiff’s  
20 Complaint appears to claim that he was subjected to cruel and unusual punishment in the  
21

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22  
23 <sup>7</sup> The court noted *Graham*’s holding, discussed earlier, that “all claims that law  
24 enforcement officers have used excessive force should be analyzed under the Fourth  
25 Amendment.” *Id.* at 1099 (quoting *Graham*, 490 U.S. at 395). The court then found that  
26 its pre-*Graham* due process precedent in *Maddox v. City of Los Angeles*, “set the standard  
27 for objectively reasonable post-arrest care.” *Id.* (discussing 792 F.2d 1408, 1415 (9th Cir.  
28 1986)). That precedent dictates “that ‘due process requires that police officers seek the  
necessary medical attention for a detainee when he or she has been injured while being  
apprehended by either promptly summoning the necessary medical help or by taking the  
injured detainee to a hospital.” 441 F.3d at 1099 (quoting *Maddox*, 792 F.2d at 1415).

1 denial of medical care and in his handcuffs being too tight and causing pain. As  
2 previously noted, there is no evidence to support Plaintiff's claim regarding handcuffs  
3 and the Court has already addressed his medical claim above. The Court  
4 **RECOMMENDS** that summary judgment be **GRANTED** for Defendants on this claim.

#### 5 **5. Monell Claim**

6 Defendants accurately note that it is difficult to decipher whether Plaintiff is  
7 asserting any of his claims against the San Diego Police Department or the City of San  
8 Diego for an unlawful policy, custom, or habit pursuant to *Monell v. Department of*  
9 *Social Services of New York City*, 436 U.S. 658, 690 (1978). However, to state a § 1983  
10 claim against a local government under *Monell*, a plaintiff must show: (1) he was  
11 deprived of a constitutional right; (2) the municipality had a policy; (3) the policy  
12 amounts to deliberate indifference to the plaintiff's constitutional right, and (4) the policy  
13 is the "moving force behind the constitutional violation." *Anderson v. Warner*, 451 F.3d  
14 1063, 1070 (9th Cir. 2006). Plaintiff has neither plead nor put forth any evidence in  
15 support of any of these requirements. The Court **RECOMMENDS** that summary  
16 judgment be **GRANTED** for Defendants on this claim.

#### 17 **II. Motion to Dismiss for Failure to Prosecute**

18 Defendants move to dismiss this entire action with prejudice for failure to  
19 prosecute. As discussed above, Plaintiff has not responded to any of Defendants'  
20 discovery requests or filed an Opposition to Defendants' Motion for Summary Judgment.  
21 Additionally, Defendants argue Plaintiff has failed to comply with the Scheduling  
22 Order's pretrial requirements to serve initial or pretrial disclosures or provide a pretrial  
23 order to Defendants.

1 Defendants do not address any of the five factors the district court must weigh to  
2 determining whether to dismiss a case for lack of prosecution. *See Sw. Marine Inc. v.*  
3 *Danzig*, 217 F.3d 1128, 1138 (9th Cir. 2000).<sup>8</sup>

4 Given the analysis above and recommendation that summary judgment be granted  
5 to Defendants on all claims on the merits, the Court **RECOMMENDS** the Motion to  
6 Dismiss for Failure to Prosecute be **DENIED** as moot.

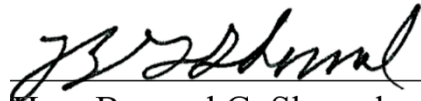
### 7 **CONCLUSION**

8 The Court submits this Report and Recommendation to United States District  
9 Judge Cynthia Bashant under 28 U.S.C. § 636(b)(1) and Local Civil Rule HC.2 of the  
10 United States District Court for the Southern District of California. For the reasons  
11 outlined above, **IT IS RECOMMENDED** that the Court **GRANT** Defendants' motion  
12 for summary judgment and **DENY** as moot Defendants' Motion to Dismiss for Failure to  
13 Prosecute.

14 **IT IS HEREBY ORDERED** that any party to this action may file written  
15 objections with the Court and serve a copy on all parties **no later than May 19, 2017.**  
16 The document should be captioned "Objections to Report and Recommendation."

17 **IT IS FURTHER ORDERED** that any Reply to the Objections shall be filed with  
18 the Court and served on all parties **no later than June 2, 2016.** The parties are advised  
19 that failure to file objections within the specified time may waive the right to  
20 raise those objections on appeal of the Court's Order. *See Turner v. Duncan*, 158 F.3d  
21 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991).

22 Dated: May 5, 2017

23   
24 Hon. Bernard G. Skomal  
25 United States Magistrate Judge

26 <sup>8</sup> Courts must consider "(1) the public's interest in expeditious resolution of litigation; (2)  
27 the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the  
28 public policy favoring the disposition of cases on their merits; and (5) the availability of  
less drastic sanctions." *Sw. Marine*, 217 F.3d at 1138.